(1) Supreme Court, U.S.
FILED

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL BROKAMP and
DONNA BROKAMP,
Petitioners,

v.

MERCY HOSPITAL ANDERSON
and JAMES BARRINGER,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO,
FIRST DISTRICT, HAMILTON COUNTY**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is not the United States Constitution violated when the courts permit a juror to serve (and be the deciding vote) where said juror does not believe that people should be allowed to come to court to ask for money?

2. When, during *voir dire*, a prospective juror fails to fully and/or truthfully disclose personal opinions which override the justice system, the inquiry for the court then is not into the validity of the verdict; but rather, the competency of the juror to sit as a juror in the case, and upholding the constitutional right to impartial jurors are at issue and the *aliunde* rule is inapplicable.

3. If a juror's bias or prejudice is demonstrated which was not honestly disclosed in *voir dire* the trial court has a duty to declare a mistrial and protect the Constitutional guarantee of an impartial jury.

4. Where a plaintiff adduces evidence in support of two conclusions: (1) that the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed the trial court errs in refusing a request to charge the jury on the issue of *res ipsa loquitur.*

5. Where a party has no explanation for the absence of evidence that is normally present, a court should,

upon request, instruct the jury as to a negative inference.

6. Great care must be used if a judge questions a witness so as not to seem to become an advocate or give the jury an erroneous impression and a court should not inject its own opinion for that of expert witnesses.

7. A party subjected to clear prejudice by a trial court is denied "due process" under the United States Constitution and should be granted a new trial free of judicial prejudice.

PARTIES TO THE PROCEEDINGS

Petitioners

Daniel Brokamp and Donna Brokamp. Petitioners are individuals and have no corporate affiliations.

Respondent

Mercy Hospital Anderson and James Barringer.

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A copy of the opinion of the Court of Appeals decision decided April 16, 1999, Appendix A, (App. 1a); the Ohio Supreme Court's dismissal of September 1, 1999, Appendix B (App. 35a); and the Ohio Supreme Court's denial of reconsideration of October 20, 1999, Appendix C (App. 36a).

JURISDICTION

This court has jurisdiction to review an appeal from the highest court of each State pursuant to 28 U.S.C.A. 1257.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendments V, VII, and XIV

Amendment **V** [due process]: "No person shall . . . be deprived of life, liberty or property, without due process of law. . ."

Amendment **VII** [jury trial]: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . ."

Amendment **XIV** [State due process]: "[n]or shall any State deprive any person of life, liberty, or property without due process of law. . ."

STATEMENT OF THE CASE

Basis Of Jurisdiction In First Instance

This is a case of nursing negligence involving an improper intramuscular injection. The case proceeded to trial, the appeals court overruled all 21 assignments of error. Jurisdiction was declined by the Ohio Supreme Court and reconsideration denied.

STATEMENT OF FACTS

Plaintiff sustained a permanent nerve injury (down the inner aspect of the groin and leg) by an improper intramuscular injection by a nurse following back surgery.

Four facts are undisputed in all of the experts' depositions:

1) an injection given in the upper outer quadrant of the buttock absolutely cannot cause injury to the lateral femoral cutaneous nerve [#91, p.29];

2) an injection would have to be given in the thigh to sustain a lateral femoral cutaneous injury;

3) Plaintiff has, in fact, a lateral femoral cutaneous nerve injury (with no prior history of such before the injection [Bauer depo. T.p.25-26]); and

4) defendant nurse failed to document where he gave the August 30, 1993, 11:15 A.M. injection to plaintiff.

The trial court nonetheless permitted defendant nurse to change his testimony at trial. The trial court began its own

questioning of a nurse expert bringing up issues which were irrelevant and misleading to the jury.

Amazingly, during trial, the trial judge placed plaintiffs' counsel on the stand and personally cross-examined him and then permitted defense counsel to also cross-exam plaintiffs' counsel as to pre-trial discovery issues (interrogatories answers). The trial court repeatedly refused to instruct the jury on *res ipsa loquitur* or negative inference.

Most shamefully the trial court refused to address the issue of one of the juror's stating that he did not believe in the system and did not think that persons should be "allowed" to come to court to ask for money. This juror further tainted the other jurors by stating that his brother-in-law was milking a worker's compensation claim and he knew how "these things" went.

Specifically the facts are that on August 30, 1993 plaintiff, Daniel Brokamp, was admitted to defendant Mercy Anderson Hospital for same-day surgery on a disc in his low back. The surgeon ordered post-operative pain medication be given; *i.e.* Demerol 100 milligrams intramuscular ("IM" injection).

The nurse in question, Barringer, a male nurse, (a correspondence nursing course graduate) was normally assigned to the night shift, but during this period, was being "acquainted with" working on the "more involved" day shift in August, 1993.

Nurse Barringer testified he had "no personal recollection whatsoever" of plaintiff or this errant injection incident. In deposition Barringer testified that he was "absolutely" certain that he gave this injection in the upper

outer quadrant of the buttocks (which conveniently is where the acceptable site is located). However, the trial court permitted him to testify at trial (contrary to his deposition testimony) that he may have given it in the outer part of the thigh.

The plaintiffs' family members (Mrs. Brokamp; daughter Kelly; and son Daniel, Jr.) were all in the hospital room when the injection was given. Each of them observed Barringer wiping down the front part of the leg, not the side or the buttocks (since he was lying supine) which is not a proper injection site. Each testified (as did plaintiff) that Barringer came in accompanied by an older female nurse who was giving Barringer's orders and instructing him. Each of the family members recalls Barringer being very unsteady, "very nervous . . . shaky, fumbling" and unsure of himself.

While no one watched precisely where the needle was injected, physically it could not have been injected in the proper upper outer quadrant of the buttocks for that location was not accessible from the position of plaintiff, on his back. Interestingly, defendant nurse admitted that he has "never" given an IM injection while a patient was lying on his back.

When Barringer inserted the needle plaintiff, Daniel Brokamp, yelled:

> "Ow, is it supposed to hurt like that?" and felt like an "electric" shock run down his right leg . . . "Something is not right here. . . . I have had a lot of shots. I have never had a shot do this before in my life."

Defendant nurse Barringer's note in its entirety stated:

"11:15 Pain -D[data]: Low back pain; A [assessment]:_____ {blank}; Demerol 100 mg IM - JB." There was no site as to WHERE the injection was given charted!

The nurses quickly cleared out of the room. Mrs. Brokamp testified she realizing something was amiss and even followed the nurse out into the hall and saw the female nurse chart something in the middle of the page of the chart. The female nurse told Barringer "you're going to have to initial this." Mrs. Brokamp requested that the female nurse make a note of the incident. [The hospital claimed there was no incident report]. Mrs. Brokamp got no response but was ignored. Later Mrs. Brokamp saw the medical record which the hospital produced and that page was not the same page that she had seen the entry made. Defendants, while presenting testimony of "no recollection," nonetheless contended there was no older female nurse.

Three days post-op the surgeon, Dr. Ferree, noted:

> Unfortunately, he states that during an IM injection into his right quadriceps muscle, upon immediate insertion of the needle, he experienced burning and dysesthesias over the anterolateral surface of the right quadriceps. This has been persistent since that time and he complains primarily now of numbness in this distribution, i.e. the lateral femoral cutaneous nerve.

One week later Dr. Feree's 9/9/93 notes state:

> he is constantly plagued by burning and dysesthesias over the dorsum of his right thigh. He feels this is now his chief complaint

and it is the identical pain as that the suffered during the IM injection prior to his discharge.

Dr. Ferree's partner, Dr. Fitz, confirmed the diagnosis:

> Q: And, doctor, am I correct that in your -- in your opinion within a reasonable degree of medical probability that it's obvious to you the injection in your opinion, -- and the injection, I mean the injection that he received on August 30th, 1993 at 11:15 a.m. per history -- is it your opinion within a reasonable degree of medical probability that obviously that injection in your opinion injured the lateral femoral cutaneous nerve?
>
> A: Yes, that's my opinion.

[Fitz trial testimony p.50].

Plaintiffs' nurse expert testified defendants were negligent. She testified that the standard of nursing care is to chart the drug, the route of administration (i.e. intramuscular; intravenous, etc); the amount of drug and site of the injection. Plaintiffs' nurse expert further testified that the most probable cause of plaintiff's injury is the "11:15 a.m. . . . improperly administered injection."

Plaintiff's by board-certified neurologist, Dr. Bauer testified that Mr. Brokamp had an injury to his lateral femoral cutaneous nerve as a result from the injection of August 30, 1993. This fact was admitted by defendant's own witness, Dr. Roberts, stating plaintiff was in fact "suffering from a significant injury to his lateral femoral cutaneous nerve."

Four facts are undisputed in all of the experts' depositions:

1) an injection given in the upper outer quadrant of the buttock absolutely cannot cause injury to the lateral femoral cutaneous nerve [#91, p.29];

2) an injection would have to be given in the thigh to sustain a lateral femoral cutaneous injury;

3) Mr. Brokamp has, in fact, a lateral femoral cutaneous nerve injury (with no prior history of such before the injection [Bauer depo. T.p.25-26]); and

4) nurse Barringer failed to document where he gave the August 30, 1993, 11:15 A.M. injection to Mr. Brokamp.

The testimony at trial was that in the ordinary course of events the lateral femoral cutaneous nerve is not injured if the injection is done properly. Counsel repeatedly requested the trial court for a *res ipsa* instruction and was denied such each time.

During deliberations the jury had several questions to the court indicating that they had concluded 7-1 that plaintiff did "suffer an injury to his lateral cutaneous nerve as a result of the injection at the hospital on August 30, 1993"; but they were deadlocked on the issue as to whether the standard of professional nursing care was breached because they did not think the plaintiff "conclusively proved exactly where the needle was inserted".[1]

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[1] The court's instructions contained two "issues": 1) Did plaintiff, Daniel Brokamp, while a patient at Mercy Hospital,

At this point in the proceedings, the *res ipsa* charge was clearly proper and necessary to achieve justice. The jury was obviously confused and needed direction. The court again refused to charge the jury on "*res ipsa*" or "negative inference."

During trial the trial court asked its own questions regarding standard of care and even held a separate hearing examining under oath plaintiff's counsel as to his client's answers to interrogatories. The jury eventually voted 6-2 on the standard of care issue in favor of defendant. For the jury to conclude causation; but not find liability where the uncontradicted evidence was that such an injury does not occur in absence of doing an injection outside of the approved site, is clearly contrary to reason and the law, particularly in the absence of a *res ipsa loquitur* instruction.

Immediately after the jury rendered it verdict, two of the jurors informed plaintiffs' counsel that one of the jurors, Earl Eldridge, had stated that he did not believe that people should be "allowed" to come to court to get money. He said had a brother-in-law who was fraudulently pushing a worker's compensation claim and he knew about "these things." Plaintiffs' counsel had both jurors' testimony recorded by the court reporter while still in the courtroom and made part of the record herein. Counsel immediately went to trial court and the judge refused to investigate or take any further

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August 30, 1993, suffer an injury to his lateral femoral cutaneous nerve as a result of an injection given to him by Nurse Barringer?; and 2) If such injury occurred, did Nursing Barringer in giving such injection act negligently by failing to follow the proper standard of care? [T.p. 1491] When the jury was "hung" it indicated to the court that seven jurors answered "Yes" to issue #1; but that they did not have a 3/4th's majority as to issue #2.

testimony citing the *aliunde* rule and did not want to get involved.

Plaintiffs filed a motion for new trial and JNOV. After listening to the presentations the court denied the motions and went off on a tirade about that "this whole matter" was the plaintiff's fault in not truthfully answering the initial interrogatories, clearly indicating that the judge had a true "prejudice" about plaintiffs throughout this entire case. He then made medical conclusions about what he believed really medically happened (none of which had been even suggested by the experts on either side in the case).

ARGUMENT

1. **Is not the United States Constitution violated when the courts permit a juror to serve (and be the deciding vote) where said juror does not believe that people should be allowed to come to court to ask for money?**

2. **When, during *voir dire*, a prospective juror fails to fully and/or truthfully disclose personal opinions which override the justice system, the inquiry for the court then is not into the validity of the verdict; but rather, the competency of the juror to sit as a juror in the case, and upholding the constitutional right to impartial jurors are at issue and the aliunde rule is inapplicable.**

3. **If a juror's bias or prejudice is demonstrated which was not honestly disclosed in *voir dire* the trial court**

has a duty to declare a mistrial and protect the Constitutional guarantee of an impartial jury.

[argued together]

It is certainly not surprising in this era of insurance company propaganda's battle-cry that "the legal system needs fixing" that we are seeing jurors who arrive in the jury box with their "own agenda" despite the Constitution. In this case *sub judice* where the entire verdict was determined by one vote (on the issue of standard of care only; causation being found in favor of plaintiff), a new trial should clearly have been granted under the circumstances. When litigants are afforded only one trial, the courts should steadfastly protect the "right" that said trial is before an "impartial" jury.

The court in *Mazorra v. H. Meyer Dairy Co.* (Case No. CA98-03-025 3/15/99) dealing with the issue of an untruthful juror during *voir dire* held:

> [W]e agree with the appellants that a juror being untruthful, even by omission, during *voir dire* is a separate issue from the jury deliberation. A juror prejudging his vote on damages of a trial raises an obvious question about fundamental fairness and due process.

[p.7 of opinion].

Here the trial court should have granted a new trial (per Civ. R. 59) given that there was an "irregularity in the proceedings" of the jury and misconduct of the jury. The two jurors stated that they were shocked and asked Mr. Eldridge how he could sit on the jury since he did not state his bias when asked similar questions in *voir dire*. The trial court

herein did in fact question, during *voir dire*, the array including Mr. Eldridge[2].

> While courts have typically refused to consider such issues, citing the *aliunde* rule; this factual situation poses a different situation. In the usual situation a verdict is being attacked by testimony concerning the deliberation process and matters considered by the jury during deliberations. However, courts have held that where a juror is untruthful in answering questions on *voir dire* examination, an irregularity occurs which relates not to the validity of the verdict, but as to the "competency" of the juror to sit as a juror which prevents the parties from having a fair trial. Therefore, the *aliunde* rule is not applicable where a juror is untruthful in *voir dire*. [citations omitted]

The court in *State of Ohio v. Rudge*, (1993) 89 Ohio App.3d 429, 624 N.E.2d 1069[3] stated:

> The rule [606(B)] simply does not come into play because the allegations are submitted for their relevance to matters prior to the jury's deliberations; the bias and prejudice of juror Stillings. . . . [T]he

---

[2] Court: "Is there anybody here that will not follow the law as I give it to you, whether you agree with it or not?" [T.p. 127]

[3] A motion for leave to appeal to the Supreme Court of Ohio was overruled in (1993), 67 Ohio St.3d 1502, 622 N.E.2d 651.

protection of appellee's constitutional right to a fair and impartial jury does not cease simply because a verdict has been rendered.

The court further found that it is a Constitutional guarantee that an impartial jury means every juror, and even if one juror is not impartial a new trial must be had. Particularly in this case since the verdict was 6-2. [In Ohio a mistrial is granted in a civil case if less than 6 concur (Ohio Rule of Civil Procedure 49)].

In the case *sub judice*, Juror Eldridge quite similarly was "prejudiced" in his belief that people should not be permitted to come into court and ask for money. A more "prejudicial" remark can hardly be imagined! Numerous other states have similarly found the constitutional guarantee of an impartial jury is to be protected from those who are not truthful in *voir dire*.

It is a very sad day when no court in this country can recognize the basic denial of a basic Constitutional guarantee. If this "right" is not protected, let's all pack up and go home. It would be hypocritical to carry on the charade that the right to a fair and impartial jury is guaranteed in this Country.

4. **Where a plaintiff adduces evidence in support of two conclusions: (1) that the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed the**

trial court errs in refusing a request to charge the jury on the issue of *res ipsa loquitur*.

Plaintiffs requested several times of the court to charge the jury on the issues of *res ipsa loquitur* and negative inference. It was clear that the jury was confused and needed instruction given their questions from the jury room. Nonetheless, the court continually refused to help them understand that given the missing evidence of the medical documentation they had available two legal inferences to bridge the gap (i.e. *res ipsa loquitur*; and negative inference).

The Ohio Supreme Court in *Hake v. Widemann Brewing, Co.*, (1970), 23 Ohio St.2d 65, 66-67, 262 N.E.2d 703, has defined the application of the *res ipsa* inference.

The evidence herein at trial substantiated a charge on *res ipsa loquitur*:

> Q: And if you performed -- or you did perform the injection on 8/30/93, as you demonstrated here yesterday, to be your usual approach, would you agree that injury to the lateral femoral cutaneous is an injury which would not have ordinarily occurred in the ordinary course of medicine?
>
> A: Yes.
>
> Q: So if the injection was performed procedurally within the accepted intramuscular injection sites in the ordinary course of events, injury to the lateral femoral cutaneous does not occur, does it?

A: That's correct.

[Trial testimony of Nurse Barringer, T.p. 922]

Plaintiffs also elicited similar testimony from Nurse Fanuele:

> Q: Ask you about three of the approaches that we talked about, that in the ordinary course of events, if ordinary care of a registered nurse is given and in using any of the three approved injection sites that we have talked about, is injury likely to occur?
>
> A: No.
>
> Q: And is it reasonably probable that injury would not occur if those three proper sites were used and properly done?
>
> A: Would you repeat that?
>
> Q: Is it true that injury to a nerve would probably not occur if any of the three sites are done and the nurse properly administered it at any of the three sites?
>
> A: Yes.

[Fanuele, trial testimony, p.486, l.12].

5. Where a party has no explanation for the absence of evidence that is normally present, a court should, upon request, instruct the jury as to a negative inference.

The nurse herein charted the type of injected medication and the amount, but conveniently did not chart the injection site. Defendant nurse admitted that his ordinary habit and custom was to chart the injection site and there was expert testimony that the failure to chart the injection location was negligent in and of itself. This omission left the plaintiffs with no documentation of where the nurse placed the injection (and the nurse claiming no recall). This was the precise issue the jury was hung-up on (could plaintiffs' prove exactly where the injection occurred). This is precisely why the law provides the jury with a negative inference where evidence that should be brought forth by the defendant is conveniently absent.

Ohio courts have long adopted the "negative inference". *Cleveland Concession Co. v. Cleveland*, 84 Ohio Ap.1, 38 Ohio Ops. 583; 53 O.L.Abs. 39, 83 N.E.2d 818; *Reams v. State*, 53 Ohio Ap. 19, 4 N.E.2d 151. "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse." *Clifton v. United States*, 4 How. 242, 247, 11 L.Ed. 957. "Silence then becomes evidence of the most convincing character." (*Runkle v. Burnham*, 153 U.S. 216, 255, 14 S.Ct. 837, 840, 28 L.Ed. 694).

The Ohio Supreme Court has already addressed "intentional" alteration/destruction in *Moskovitz v. Mt. Sinai Medical Center*, 69 Ohio St.3d 638, 635 N.E.2d 331 (Ohio 1994):

> An intentional alteration, falsification or destruction of medical records by a doctor, to avoid liability for his or her medical negligence, is sufficient to show actual malice, and punitive damages may be awarded whether or not the act of altering, falsifying, or destroying records directly causes compensable harm.

[Last sentence of Syllabus #1]

This case presents the next logical step; i.e. when a medical professional "omits" information that should be recorded, in order to avoid liability the jury should be able to consider such conduct and make a negative inference.

The testimony was uncontradicted that it is the usual protocol and practice to chart location of an injection site; and but for Barringer's failure to so record, the location of the injection would be known.

Barringer on cross-examination had to admit that he "neglected" to chart the site of injection; the chart should have an entry as to where the injection was given; and it is the standard of care to have such an entry [T.p. 239-40].

> Q: You didn't follow your normal protocol in this case, did you?
>
> A: I guess that **I did not**.
>
> Q: And because you didn't record the site and you don't remember giving the injection to Mr. Brokamp, there is no evidence

as to where Mr. Brokamp received this injection on August 30, 1993; is that correct?

A: Yes, sir.

Q: And if you had recorded the site where you gave the injection, it would not be an issue now. We would know what it says, is that correct?

A: Yes.

[Barringer, T.p. 268].

Q: Well, if your ordinary standard procedure is to give it in the upper out quadrant, and that's what you contend that you did in this case, which you told us that's the most probable thing -

A: Yes, sir.

Q: --- that injury to the lateral femoral cutaneous nerve is an injury which would not ordinarily occur in the ordinary course of events had an injection been given in the upper outer quadrant; is that correct?

A: **Absolutely**, sir.

[Barringer 10/15/97, p.47].

The trial court did not feel the charges were warranted and refused to so charge the jury. The jury sent several "questions" back to the court. The jury's conundrum of

feeling that the plaintiffs did not "conclusively prove" exactly WHERE the injection was given, was certainly of consequence that they were unaware of this legally permissive inference of *res ipsa* under these circumstances. Plaintiffs clearly adduced sufficient evidence to have had a *res ipsa* charge given and it was an error of law under the circumstances not to so instruct.

Likewise, given that defendants in this particular circumstance are the sole authors of the medical records, and that defendants had a "duty" to make a complete medical record; and defendants had to admit they failed ("neglected") to perform such duty; the situation presents a clear application of the "negative inference" doctrine. If it is not applied this case would be an open invitation for all healthcare providers to write little or nothing [as in this case] and thereby leave open the medical record to be supplemented by mere affirmative Monday morning quarter-backing "speculation." This is precisely the rationale behind the legal rule which prevents such gamesmanship with evidence. There can hardly be a more appropriate case for a negative inference than the case *sub judice*. A wrongdoer should not be permitted to profit by his failure to produce evidence. The jury should have been instructed on negative inference as well as *res ipsa loquitur*. To refuse such instructions when thy were legally appropriate and necessary clearly violates due process.

6. Great care must be used if a judge questions a witness so as not to seem to become an advocate or give the jury an erroneous impression and a court should not inject its own opinion for that of expert witnesses.

It became apparent that the jury lost their way on the issue of the nursing "standard of care." This was being addressed in cross-examination of defendant's nurse expert, Brummer, when the trial court *sua sponte* began asking questions.

> THE COURT: Who establishes nursing standards? Is there some one group that does, one book, one organization? **Does each hospital set its own standards?** How are they set?
>
> THE WITNESS [Brummer]: By groups of nurses statewide, both.
>
> THE COURT: Is there any variation allowed to an individual hospital regarding these standards?
>
> MR. METZ: Objection.
>
> THE COURT: You just lost that one. Overruled. Can you answer that?
>
> THE WITNESS: There can be some slight variations.

[T.p. 1061]

Furthermore, plaintiffs were denied the opportunity to have their nurse expert address the questions posed by the trial court to the defendant's nurse expert.

At this point plaintiffs objected since, the court created by such questioning an expectation in the minds of the jury.

The court created several issues in the minds of the jury by his series of questions: is there a "Mt. Olympus-like" body that dictates the "standards"; and cannot each hospital make its own standards. This is contrary to basic first year law school proposition set forth in *The T.J. Hooper*, 2 Cir. 1932, 60 F.2d 737 *cert. denied* 287 U.S. 662. In medical negligence cases the "standard" is adduced by experts qualified under Evid.R. 601(D) that have direct patient care.

The jury, by this court's *sua sponte* questioning, led the jury to believe that plaintiff failed to "conclusively prove" the standard of care violation since plaintiffs did not bring in these "national rule makers" or worse that since defendant complied with its own policies and procedures it could not be negligent!

Under the circumstances, (i.e. no *res ipsa loquitur* charge; no negative inference), such judicial questions created a prejudicial effect in the minds of the jurors that plaintiffs had failed to bring the witnesses the court was looking for. A party should not have to fight the opposition and the court itself. Such situation obviously violates "due process."

7. A party subjected to clear prejudice by a trial court is denied "due process" under the United States Constitution and should be granted a new trial free of judicial prejudice.

Defendant's "tactic" of claiming that plaintiffs were "changing" the theory of their case (i.e. correcting the name of the particular injured nerve) seven months prior to trial, planted the seed of prejudice in this trial court's mind. Plaintiffs' counsel had assumed it was plaintiffs' "sciatic nerve" that was injured; however the physicians clearly

indicated in all the medical records (and depositions) that it was the "lateral femoral cutaneous nerve" [LFCN]. Since one interrogatory mentioned the "sciatic nerve" the defendants on the morning of trial claimed they were "surprised (even after all discovery had been completed addressed to the LFCN and needed a continuance. After conducting the extensive hearing in March. 1997, the trial court granted defendant's a seven (7) month continuance to cure their "surprise." Plaintiffs were unaware that the trial court apparently had already prejudged this entire case on that one issue. However, from the trial court's conduct, it was clear that this judge was not able to fairly and unbiasly consider or preside in plaintiffs' case as evidenced by the trial court's diatribe at the end of the post-trial motions:

> Well, I'm going to discuss the base a bit, which the Court of Appeals has done on occasion to me and other judges, is substitute their judgement of fact; opine, and I'm going to substitute my judgment on the fact of the jury. [T.p.1578]. . . . the most important thing I think my opinion in this whole case was the incredibly dramatic change of story from the plaintiff as to what the case is about on the day that it was originally set for trial. . . . There was evidence, if you believe the plaintiffs' witnesses . . . which would be a classic sciatic nerve injury.

The court then comes to "medical" conclusions and diagnoses which no expert (plaintiff or defendant) ever opined:

> In other words, all the evidence in this case from the plaintiffs . . . was consistent

> with an injury to a motor nerve because it caused motor damage, motor reaction.

The court demonstrated its defense bias: "defendant . . . at the time was preparing for a defense injury to the sciatic nerve, and then suddenly had to switch to a defense to an entirely different nerve."

> So my reading of this case is that the plaintiff actually did suffer probably some injury to the sciatic nerve when he was in the hospital, . . . the problem is it got completely better. And suddenly he switched his story saying that isn't' what happened to me . . . , and then this had to be somehow or other made consistent with the claim that he got an injury to his cutaneous nerve. . . . I'm sure if the jury had heard that he had originally claimed he had an injury to his sciatic nerve that their verdict would have taken about four minutes for the defendant . . . this change in story . . . it's so dramatic, it effected everything that happened in this case

[T.p. 1758-1585].

The trial court clearly literally was "prejudiced" in this matter and such prejudice pervaded the entire trial, which can explain why plaintiffs were denied necessary evidentiary rulings and denied a fair trial.

The Fifth Amendment's guarantee of "due process" certainly includes a trial before a judge who is free from literal prejudice. To hold otherwise, is only to perpetuate the injustice.

REASONS FOR ALLOWING THE WRIT

We cannot allow our fundamental principles of "a fair and impartial jury" and "due process" to be swept aside by the negative propaganda instilled in the general public by insurance companies that "our legal system is broken and needs to be fixed." We cannot allow people with such a fundamental prejudice to determine cases where a citizen's life is on the line. Plaintiff, a Navy veteran, father and husband has expended his entire life savings to pursue justice in this case and has met with nothing approximating a "fair trial." Is this the justice system he laid his life on the line to protect? Trial judges who see "plaintiffs" as mere obstacles to clearing their dockets and whose prejudice is clear on its face should not be permitted to continually deny due process to citizens.

This is a test case to determine just how far our legal system has fallen. If the highest court of this land can turn its back on these Constitutional violations, then we are doing nothing but continuing a sham for the public that our Constitution has any meaning. The lower courts seem more concerned with expeditiously removing a case from the docket than obtaining a just result. If this Court does not have the interest or time to correct such an injustice as this case, then our country has clearly lost touch with our Country's founding principles. I have little hope that this petition will ever be seen by a Justice, let alone have a Writ issued. This Court' indifference and inattention to safeguarding fundamental Constitutional rights will be the best evidence to my children and their generation that the American legal system has indeed failed our Founding Fathers' hopes when Constitutional violations of this magnitude do not stir or concern the most important judges of our Land.

This trial resulted in a nightmare of injustice. If citizens can now expect that their cases will be heard by individuals who are permitted to sit as jurors who do not believe in the legal system; we no longer have the right to a jury trial in this country. Also, when a trial judge becomes an adversary and expert for the opposing party, "due process" is clearly denied. This case presents significant "timely" issues which repeatedly occur in the trial courts given the current atmosphere of lack of faith in our judicial system. Such attitude will continue and consume this Country without a response from this Court.

Is it not disturbing to the Justices of the Supreme Court that the courts of Ohio find no Constitutional problem in allowing a verdict to stand based upon the one vote of a person who will not follow the law and in fact does not believe in the civil law?

Respectfully submitted,

/s/_____

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APPENDIX A

COURT OF APPEALS OF OHIO
FIRST DISTRICT, HAMILTON COUNTY

[Filed: April 16, 1999]

No. C-97-1077

DANIEL BROKAMP AND DONNA BROKAMP,
Plaintiffs-Appellants,

v.

MERCY HOSPITAL ANDERSON AND JAMES BARRINGER,
Defendants-Appellees.

OPINION

SUNDERMANN.

I. Introduction

On August 29, 1994, plaintiffs-appellants, Daniel and Donna Brokamp, filed a medical negligence claim and a loss-of-consortium claim against defendants-appellees, Mercy Hospital Anderson and James Barringer. They alleged that

Mercy Hospital and Barringer, one of the hospital's nurses, were negligent in administering an intramuscular injection in Daniel's leg after a surgical procedure was conducted at the hospital. The Brokamps amended their complaint on March 10, 1997. A jury trial commenced on October 14, 1997, and, on November 4, 1997, the jury rendered a verdict in favor of the appellees. On December 3, 1997, the Brokamps moved for a new trial and judgment notwithstanding the verdict (jnov), and on December 16, 1997, they filed a notice of appeal. By order, this court remanded the case to the trial court for the limited purposes of permitting that court to consider and rule on the motions for new trial and jnov. The trial court overruled the motions on February 19, 1998, and the case was then submitted to us for review on the merits.

II. Statement of Facts

It is uncontested that on August 30, 1993, Daniel Brokamp had surgery on a disc in his lower back at Mercy Hospital Anderson. Following the operation, Daniel was transferred to the Orthopedic Unit A1 so that his recovery could be monitored. At 11:15 A.M., Nurse Barringer administered 100 milligrams of Demoral in Daniel's thigh by an intramuscular injection in order to relieve Daniel's back pain resulting from the surgery. The injection was documented in the medical record but the anatomical site of the injection was not recorded. Daniel contended that he suffered an injury to his right leg as a result of the injection, and Donna requested relief for loss of consortium.

The basis of this dispute focuses on how and where the intramuscular injection was given and the extent, if any, of

the injury to Daniel's leg. At the trial, conflicting testimony relating to these issues was presented.

Nurse Barringer testified that he had no recollection of Daniel or the events in question. But, based on a review of Daniel's medical chart, Nurse Barringer testified that he did in fact administer the intramuscular injection. He also testified that, based on the medical chart, nurse extender Marla Arszman took Daniel's vital signs around the same time the injection was administered. Although Nurse Barringer was unable to state where he gave the injection on August 30, 1993, he testified that his normal practice was to give an intramuscular injection in the upper outer quadrant of the buttocks, unless the patient could not be turned over on his side, in which case he would give the injection in the middle part of the thigh. Further, he testified that he had never given an intramuscular injection to a patient in the upper quadrant of the thigh. Nurse Barringer also testified that if a patient complained that an injection was painful, he would stop the injection and discontinue administering the drug.

Daniel, his wife, Donna, and their children, Daniel Jr. and Tonya, testified that two nurses were present when the shot was given, a male and an older female. They all testified that they saw Daniel's leg jerk upwards when the shot was administered. But they varied as to where the injection was administered. Daniel testified that the male nurse administered the shot in the upper area of his right thigh toward the front. Donna and Tonya testified that Daniel was turned on his side when the shot was given. Daniel Jr. testified, based on a prior deposition, that the shot was administered under his father's rear end.

According to Daniel, the whole right front part of his leg was burning after he received the injection. Donna testified that she followed the nurses into the hall to ask them to make a note of the incident, and that she saw the older female nurse chart something in the middle of the page. Donna also stated that when she later saw the medical report, the page produced by the hospital was different than the one she had seen in the hall.

Throughout the day, Nurses Williamson and Chapman continued to evaluate Daniel's recovery. Nurse Williamson and Nurse Chapman both testified that Daniel never complained of burning pain, tingling, numbness, or hypersensitivity in his right leg, while Daniel testified that his thigh and leg continued to burn and were numb. Later that day, Daniel was discharged from the hospital.

Daniel testified that his back improved following the surgery, but that he began suffering from pain in his leg and thigh. In a follow-up visit with his back surgeon, Dr. Ferree, Daniel complained of numbness in his leg, particularly in the lateral femoral cutaneous nerve. Dr. Ferree referred Daniel to Dr. Fitz to determine the etiology of Daniel's leg pain. Dr. Fitz opined that, based on Daniel's explanation of his pain, he had suffered from an injury to the lateral femoral cutaneous nerve. It was generally agreed upon by expert testimony that if the intramuscular injection had been properly administered in Daniel's leg, then it was impossible for Daniel to have suffered an injury to his lateral femoral cutaneous nerve. But if the shot was improperly administered in the upper quadrant of the thigh, then an injury to the lateral femoral cutaneous nerve could have occurred.

A jury found that the hospital was not negligent in its care of Daniel and, as a result, that Donna had not suffered loss of consortium. The trial court entered judgment in favor of Mercy Hospital and Nurse Barringer, and the Brokamps appealed, In addressing the Brokamps' twenty-one assignments of error, we have discussed them in the order that they would have occurred at trial. Based on our review of the record, we hold that none of their assignments of error are well taken, and we affirm the judgment of the trial court.

III. Assignments of Error

A. Motion in Limine

In their nineteenth assignment of error, the Brokamps allege that the trial court erred in overruling their motion in limine, which sought to prohibit the introduction of "other prior injuries" and workers' compensation matters. Because the court sustained the motion in limine relating to workers' compensation matters, and because evidence of workers' compensation was never admitted at trial, we conclude that this part of the assignment is without merit. As to the remaining part of the assignment, we find the Brokamps' argument unpersuasive.

A motion in limine "is a tentative, interlocutory, precautionary ruling by a trial court reflecting its anticipatory treatment of an evidentiary issue. In virtually all circumstances finality does not attach when the motion is granted.[1] The power to grant a motion in limine lies within

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[1] *State v. Grubb* (1986), 28 Ohio St.3d 199, 201-202, 503 N.E.2d 142, 145.

the sound discretion of the trial court.[2] In overruling the motion in limine relating to prior injuries, the trial court here stated,

> "It is very difficult to determine this because I don't know what relevance the prior injuries may have. They may have some and they may not. They may be intricately woven in the medical works and not able to be redacted. I simply cannot decide that at this time."

Balancing the court's reasoning against the Brokamps' argument that they filed the motion in limine "to prevent defense from raising irrelevant issues which clearly were meant to influence the jury and mislead them," we conclude that the trial court did not abuse its discretion in denying the motion in limine. The issues of causation and injury were unresolved issues in this case, and the resolution of whether to admit any reference to "other injuries" was properly left for the court's determination at trial. We note that the Brokamps were still accorded the opportunity to object to the introduction of "other injuries" only tangentially related to this case, and that, in fact, such objections were made and sustained. Accordingly, we conclude that the trial court did not err, and the nineteenth assignment of error is overrules.

B. Discovery Rules

In their ninths assignment of error, the Brokamps contend that the trial court erred in permitting appellees to call

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[2] *See id.* at 201, 503 N.E.2d at 145.

two rebuttal witnesses, over objection, who were not identified on the pretrial statement, and that the trial court erred in allowing a witness to discuss matters outside of the scope of discovery. Specifically, they claim the following irregularities: (1) two witnesses, Janna Deen and Marla Arszman, who were not listed on their pretrial statement, and (2) Cozetta Brummer was permitted to testify at trial to matters that she stated she would not testify to in her discovery deposition. After reviewing the record, we find no irregularities.

It is well established that one of the purposes of the Rules of Civil Procedure is to eliminate surprise, and this is accomplished by way of discovery, which provides for the free flow of accessible information between parties upon request.[3] Civ.R.26(e) recognizes a party's continuing obligation to supplement responses to interrogatories by identifying experts who are expected to testify at trial. In reviewing discovery rulings, we ordinarily apply an abuse-of-discretion standard.[4] However, "[t]he exclusion of reliable and probative evidence is a severe sanction and should be invoked only when it is clearly necessary to enforce willful noncompliance or to prevent unfair surprise."[5]

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[3] *See, e.g., Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 85, 482 N.E.2d 1248, 1250.

[4] *See. e.g., Tracy v. Merrell Dow Pharm., Inc.* (1991), 58 Ohio St.3d 147, 152, 569 N.E.2d 875, 880; *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131, 541 N.E.2d 597, 599.

[5] *Nickey v. Brown* (1982), 7 Ohio App.3d 32, 34, 454 N.E.2d 177, 180.

After reviewing the record, we conclude that the trial court did not abuse its discretion in admitting Nurse Deen's testimony. First, the Brokamps were aware of the involvement of representatives of Mercy Hospital in the case because they themselves listed "representatives of defendant hospital" as potential witnesses on their pretrial statement. However, the Brokamps were not aware of the name of one particular representative until Daniel identified in her in court. Based on the record before us, we cannot accept the Brokamps' argument that they were unduly surprised by the introduction of Janna Deen as a witness. Accordingly, we conclude that the trial court did not abuse its discretion by permitting Deen's testimony where an in-court identification was made by one of the Brokamps, and their own pretrial statement referred, albeit generally, to Deen.

Second, permitting Marla Arszman's testimony as a rebuttal witness was within the trial court's discretion. At sidebar, the following colloquy took place in determining the admissibility of Arsman's testimony:

> MRS. TYLER: We learned during our time in here that Mrs. Brokamp was saying that she saw somebody write something on the record that's no longer in the chart.
>
> Only person could have written anything else besides Etta Williamson or Mr. Barringer is the nurse extender who was in the room.
>
> THE COURT: So I am letting this witness in because the plaintiff brought up something new in its case that was not revealed to the

> defendant, so the defendant was taken totally by surprise and that's why I permitted that.

Undue surprise occurs where the expert witness's undisclosed testimony creates a substantial likelihood of surprise, and there is an indication that one party has deliberately disrupted the free flow of information between the parties.[6] Here, the trial court was attempting to rectify an undue surprise to the appellees, which was created by the Brokamps. Therefore, we are hard-pressed to understand exactly how the Brokamps were unduly prejudiced by Arsman's rebuttal testimony where they first raised the issue of altered documents at trial, and where, according to the pretrial statement, rebuttal witnesses were permitted to be called when necessary. Without further explanation by the Brokamps beyond a general assertion that they were prejudiced, we conclude that the trial court did not abuse its discretion in admitting Arsman's rebuttal testimony.

Finally, it is unclear from the discovery deposition exactly what limitations, if any, were placed on Brummer during her trial testimony. There was a general discussion at the discovery deposition that Brummer would not testify as an expert on lateral femoral cutaneous nerve injuries. However, she was listed as an expert on the pretrial statement. Because no ruling was made on this matter and because the Brokamps' abbreviated discussion of this aspect of the assignment does not shed light on this issue, we can only conclude that they were on notice that Brummer would be testifying as an expert,

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[6] *See Earl Evans Chevrolet, Inc. v. General Motors Corp.* (1991), 74 Ohio App.3d 266, 282, 598 N.E.2d 1187, 1197.

and that a discussion of lateral femoral cutaneous nerve injuries fell within her expertise. Accordingly, the ninth assignment of error is overruled.

C. Control and Interrogation by the Court

In the Brokamps' eighth assignment of error, they allege that the trial court erred in sue sponte questioning, over objection, a nurse expert witness called by appellees, which created prejudicial implications. We disagree.

It is within the court's discretion to interrogate witnesses in an impartial manner under Evid.R. 614(B): "The court may interrogate witnesses, in an impartial manner, whether called by itself or by a party." The trial court may question a witness as to relevant matters, but the court must be careful to ensure that there is no indication to the jury that one side or the other is favored by its questioning.[7]

The questions asked by the court here were not partial to either side. Specifically, the court inquired about who established the nursing standards and whether Mercy Hospital had a written policy about where to give an intramuscular injection. The record clearly demonstrates that the questions were relevant to this case and did not influence the outcome of the case in favor of on party. Accordingly, we overrule the eighth assignment of error.

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[7] *See State ex rel. Wise v. Chand* (1970), 21 Ohio St.2d 113, 256 N.E.2d 613, paragraph three of the syllabus; *Roger v. Diamond Intl. Corp.* (May 13, 1981), Hamilton App. No. C-800138, unreported.

D. Cross-Examination

In their twentieth assignment of error, the Brokamps allege that the trial court erred in permitting cross-examination of Donna Brokamp on the issue of prior retention of counsel. We are unpersuaded by this argument.

Evid.R. 611(B) permits cross-examination "on all relevant matters and matters affecting credibility." The Ohio Supreme Court has stated,

> "The scope of cross-examination and admissibility of evidence during cross-examination are matters which rest in the sound discretion of the trial judge. Thus, when the trial court determines that certain evidence will be admitted or excluded from trial, it is well-established that the order or ruling of the court will not be reversed unless there is a clear and prejudicial abuse of discretion.[8]

The trial court did not abuse its discretion by permitting cross-examination on retention of counsel, because the Brokamps had put the issue of "prior retention of counsel" directly in issue. On direct examination, Donna Brokamp placed her credibility at issue when she stated, "We are not the type of people to run to the media or, you know, run to an attorney." Further, the trial court limited the cross-

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[8] *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 163, 407 N.E.2d 490, 493.

examination on this issue, confining the scope and duration of the questions. Accordingly, we conclude that there is no evidence showing a clear abuse of discretion, and we overrule the twentieth assignment of error.

E. Relevancy of Evidence

The Brokamps allege in their fourth, fifth, sixth, twelfth, sixteenth, seventeenth, and eighteenth assignments of error that the trial court abused its discretion in permitting the admission of the following evidence: (1) demonstration evidence, (2) Dr. Katkin's discovery deposition, (3) habit testimony, (4) diagram evidence, (5) medical records, (6) expert testimony, and (7) a surveillance videotape. They also assert in their twenty-first assignment of error that the trial court erred by not admitting exhibit 3.

Evid.R. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Moreover, the trial court is vested with broad discretion in determining whether relevant evidence should be excluded due to the danger of unfair prejudice, of confusion of the issues, or of misleading the jury under Evid.R. 403(A) and (B). Evidence that is not relevant is inadmissible. It is well established that the admission of relevant evidence rests within the sound discretion of the trial court.[9] An abuse of

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[9] *See, e.g., Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 65, 567 N.E.2d 1291, 1298; *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus;

discretion is more than an error of law; it implies that the court acted unreasonably, arbitrarily, or unconscionably.[10] Absent an abuse of discretion that materially prejudices a party, the trial court's decision must stand.[11]

In their fourth assignment of error, the Brokamps contend that the trial court erred by permitting, over objection, a demonstration of the correct way to give an intramuscular injection without a proper foundation and without giving the proper safeguards to avoid undue prejudice.

In laying a foundation below, the appellees established that Nurse Barringer had been licensed as a nurse since 1986 and that he was experienced in giving injections. Further, the trial court established the proper safeguards. The trial court determined that the demonstration evidence was offered to aid the jury in understanding how a proper injection should be given, and was not to be considered as a re-creation of the injection on August 30, 1993. Also, the court properly safeguarded the admission of the evidence by stating:

> "Folks, we are going to see a demonstration of the shot given here. Keep in mind that since the witness does not remember what happened, this is not a demonstration of what happened

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[10] *See Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142.

[11] *See, e.g., Krischbaum, supra*, at 66, 567 N.E.2d at 1298-1299.

> on that day. This is just a demonstration, I think, of the way that a shot is supposed to be given* * *."

Based on the instructions given by the trial court and the foundation laid by counsel, we conclude that the demonstration evidence offered here was not so inherently misleading to the jury that its admission was an abuse of discretion; therefore, we overrule the fourth assignment of error.

In their fifth assignment of error, the Brokamps allege that the trial court erred by "forcing [them] (over objection) to read portions of Dr. Katkin's discovery deposition as a predicate to playing Dr. Katkin's trial videotape deposition." Specifically, they contend that the fact that the evidence relied upon by Dr. Katkin's in his videotape deposition was introduced after his testimony did not prohibit the presentation of the videotape first in the record.

Evid.R. 703 provides, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing." The Ohio Supreme Court has interpreted this rule to mean that the requirements of Evid.$. 703 are met when the expert's opinion is based in whole or in major part on facts perceived by her.[12] Ohio's rule differs from the federal rule in that Fed.R.Evid. 703 recognizes information made known to the expert before the hearing as

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[12] *See State v. Solomon* (1991), 59 Ohio St.3d 124, 570 N.E.2d 1118, syllabus.

another permissible source of facts or data. Before an expert opinion is rendered under the Ohio rule, Evid.R. 705 requires the identification of the specific facts supporting the opinion. Ohio's rule is diametrically opposed to Fed.R.Evid. 705, which does not require disclosure of the facts supporting an expert opinion.

At trial, the Brokamps sought to introduce Dr. Katkin's videotaped testimony in lieu of live testimony. After reviewing the deposition testimony, the trial court determined that Dr. Katkin did not disclose specific facts supporting his opinion pursuant to Evid.R. 705. To cure this defect, the trial court admitted parts of Dr. Katkin's earlier discovery deposition in order to establish a basis for the opinions asserted in his videotape deposition. Because Evid.R. 705 requires that the facts giving rise to an expert opinion be established before the opinion is rendered, we conclude that the trial court did not abuse its discretion by affording the Brokamps the opportunity to cure the defects in Dr. Katkin's videotaped testimony by introducing prior deposition evidence to establish a basis for his opinion. Accordingly, the fifth assignment of error is overruled.

In the sixth assignment of error, the Brokamps contend that the trial court erred in permitting Nurse Barringer and the other nurses to give habit testimony without a proper foundation under Evid.R. 406. We have discerned from the page references in the Brokamps' appellate brief that the "other nurses" to which they refer are Rosemary Chapman and Etta Williamson.

Initially, we note that the Brokamps misstate the evidence in the record as it relates to Nurse Chapman. They

contend that "[n]ot one of the defendants' nurse witnesses had any personal recollection of this matter." This statement is clearly inappropriate with respect to the trial court's finding that Nurse Chapman's testimony related to her own personal knowledge of the event in question. Accordingly, we overrule this assignment as it applies to Nurse Chapman.

As to Nurse Barringer's testimony, we note that the page cited in the Brokamps' brief does not relate to an objection based on habit evidence; instead, the objection refers merely to cumulative questions. However, we do note that some of Nurse Barringer's testimony was in fact admitted as habit evidence. Construing the assignment of error liberally, we have reviewed Nurse Barringer's testimony relating to habit evidence and find nothing in the record to demonstrate that the trial court abused its discretion by admitting the evidence.

Evid.R. 406 governs that admissibility of habit testimony:

> "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

To lay the proper foundation, the proponent of the evidence must show that routine in fact exists and that the

stimulus for the habitual response occurred on the particular occasion.[13]

The proper foundation was laid that Nurse Barringer normally gave a shot in the outer quadrant of the buttocks, or, when a patient could not be turned to his side, in the middle portion of the thigh. And Nurse Barringer stated that there was nothing in the medical record to support the inference that he did not act pursuant to his normal custom on August 30, 1993. Accordingly, we hold that the proper foundation was laid to admit Nurse Barringer's testimony relating to his routine, and we, therefore, overrule the assignment as it relates to him.

Finally, as to the testimony of Nurse Williamson, we conclude that it was not admitted as habit evidence, because the testimony was not offered to show that she acted in conformity with her "routine practice" on August 30, 1993. In a colloquy between the court and Nurse Williamson, the court established that her testimony was unrelated to habit evidence.

> THE COURT: So you have been asked what you normally do. That's not necessarily what you did that day; is that correct?
>
> THE WITNESS: That's right.

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[13] *See Bollinger, Inc. v. Mayerson* (1996), 116 Ohio App.3d 702, 715, 689 N.E.2d 62, 70-71.

> THE COURT: You may tell us what you normally do--go ahead--when you have a patient***.

Clearly, the Brokamps have not met their burden of showing how the aforementioned testimony was admitted as habit. Accordingly, we conclude that the trial court did not commit an error by permitting this line of testimony, and we overrule the sixth assignment of error.

The Brokamps contend in their twelfth assignment of error that the trial court erred by permitting appellees to use a color representation of an injection needle at trial to show how to give an injection at a particular site, when no witness had given testimony about that process. As we have stated, determining the relevancy of evidence is within the trial court's discretion. And, after reviewing the record, we determine that there was ample testimony given throughout the trial to support the conclusion that there are several sites where an injection may be given in the leg. Therefore, the trial court did not err in determining that the injection diagram was relevant. Moreover, before the viewing of the diagram, the court properly instructed the jury that it was "not a picture of the needle as it was stuck in [Brokamp's] leg in this case," and the jury was informed that it would have to decide where the needle was actually stuck. The dissimilarity between the color representation and the particular incident in question went to the weight, not the admissibility, of evidence. Accordingly, we conclude that the court did not abuse its discretion by permitting the demonstration evidence of the injection needle. The twelfth assignment of error, therefore, is overruled.

In their sixteenth assignment of error, the Brokamps allege that the trial court erred in permitting defense counsel to use and admit as evidence medical records without a proper foundation and without appropriate safeguards. Specifically, they allege that the records contained technical and medical terminology that was not relevant and was beyond a person's understanding, and that the records were illegible.

Based on the record before us, we cannot say that the Brokamps met their burden of showing that medical records were unduly prejudicial. There is no evidence that the jurors were confused by the admission of the medical evidence, or that they were unable to read the admitted records. Accordingly, we overrule the sixteenth assignment of error.

The Brokamps allege in their seventeenth assignment of error that the trial court erred in "permitting defense counsel to elicit testimony over objection by experts in violation of the rules of evidence and the common law of Ohio." They aver that the trial court violated various evidence rules, including but not limited to Evid.R. 601(D), and denied them a fair trial.

At the outset, we note that the Brokamps' appellate brief is woefully lacking in specificity. First, it is unclear to which experts they refer. And they do not specifically delineate how they were denied a fair trial under the rules of evidence. Pursuant to App.R. 16(A)(7), the following requirements apply to the presentation of assignments of error:

> "An argument containing the contentions of the appellant with respect to each assignment of

> error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary."

Although this assignment falls dangerously close to violating the appellate rules, we have nonetheless reviewed the cited objections to the extent warranted by this assignment. Finding no error, we cannot say that the trial court abused its discretion in admitting the experts' testimony. Accordingly, we overrule the seventeenth assignment of error.

The Brokamps maintain in their eighteenth assignment of error that the trial court erred in permitting the admission of a surveillance videotape over objection, because it was incompetent and highly prejudicial. However, after reviewing the videotape and the accompanying testimony, we conclude that the trial court did not err in determining that the videotape was relevant concerning the seriousness of Daniel's alleged injuries. The videotape revealed a series of golf outings in which Daniel participated. And the investigator's testimony contained his observations of Daniel while he was playing golf. Moreover, the evidence was not unduly prejudicial because the issue of damages and injury were intricately woven into the Brokamps' claims of negligence and loss of consortium. Accordingly, the trial court did not abuse its discretion in admitting the videotape or the investigator's testimony, and the eighteenth assignment of error is overruled.

Finally, the Brokamps allege that exhibit 3, which included a videotape and illustration booklet, should have been admitted into evidence because it was relevant to establish the standard of nursing care that was to be given by appellees. No evidence was presented to establish that the videotape or booklet was in Mercy Hospital's library and available to Nurse Barringer before the incident in question. Further, there was no evidence presented at trial that any nurse had ever observed exhibit 3 as part of his training. As a result, the trial court did not abuse its discretion in omitting this evidence based on lack of relevancy, and we overrule the twenty-first assignment of error.

F. Alleged Misconduct

In their seventh assignment of error, the Brokamps allege that the trial court erred in permitting misconduct by defense counsel throughout the trial. First, they aver that it was prejudicial error for defense counsel to adopt and persist in improper methods of impeaching the witnesses with prior deposition testimony. The Brokamps have not demonstrated how the impeachment techniques were prejudicial except to suggest that the tactics wasted time and gave the jury the impression that the witness had been untruthful. However, we point out that the objective of impeachment evidence is to attack the credibility of a witness. Therefore, we find no merit to the argument relating to improper impeachment techniques.

Second, the Brokamps contend that it was reversible error not to control the conduct of counsel during closing argument. Specifically, they allege that it was reversible error for the court to permit counsel to comment on the

following: (1) discovery issues, and (2) the Brokamps' failure to call the older female nurse as a witness. Counsel is generally afforded broad latitude in closing argument, but when argument spills into disparagement not based on any evidence, it is improper.[14] The trial court has, within its sound discretion, the ability to determine whether there is a substantial likelihood that the jury may be misled by "[r]emarks that are not supported or warranted by the evidence and which are calculated to arouse passion or prejudice or are designed to misrepresent the evidence * * *."[15] Therefore, in order to disturb the trial court's exercise of discretion, the record must clearly demonstrate highly improper argument by counsel that tends to inflame the jury.[16]

In this case, the record does not reflect that defense counsel's comments were disparaging or that they inflamed the jury. The comment relating to the older female nurse went to the credibility of the Brokamps' eyewitness testimony. The comments relating to discovery issues, although not relevant, did not tend to inflame the jury. Further, the court's admonition stating that counsel should only refer to evidence in the record, as well as the court's jury instructions relating to admissibility of evidence, diffused any possibility of

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[14] *See, e.g., Mahan v. Bethesda Hosp.* (1992), 84 Ohio App.3d 520, 527, 617 N.E.2d 714, 719; *Cusumano v. Pepsi Cola Bottling Co.* (1967), 9 Ohio App.2d 105, 122, 223 N.E.2d 477, 488.

[15] *Jackson v. Booth Mem. Hosp.* (1988), 47 Ohio App.3d 176, 180, 547 N.E.2d 1203, 1207.

[16] *See Mahan, supra*, at 527, 617 N.E.2d at 719.

prejudicial impact. Therefore, we overrule the seventh assignment of error.

G. Jury Instructions

The Brokamps allege that several errors occurred when the trial court instructed the jury. In their second assignment of error, they assert that the trial court erred in refusing to give a res ipsa loquitur jury instruction. They also allege, in their third assignment of error, that the trial court erred by failing to charge the jury on the issue of "negative inference." And, in their tenth assignment of error, they contend that the trial court erred in refusing to charge the jury on punitive damages.

The doctrine of res ipsa loquitur permits the jury to draw an inference of negligence where (1) the instrumentality causing the injury was under the exclusive control of the defendant, and (2) the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed.[17] "Generally, the doctrine of res ipsa loquitur is not applicable in a malpractice action in which its claimed applicability is based solely upon the fact that the treatment was unsuccessful or terminated with poor or unfortunate results."[18] To warrant a res ipsa loquitur instruction in a medical malpractice case,

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[17] *See Hake v. Wiedemann Brewing Co.* (1970), 23 Ohio St.2d 65, 66-67, 262 N.E.2d 703, 705.

[18] *Oberline v. Friedman* (1965), 5 Ohio St.2d 1, 213 N.E.2d 168, paragraph three of the syllabus.

the evidence must show that the defendants had exclusive management and control of that which caused the injury, and, except where medical testimony is apparent to a layman, expert medical testimony must be given to show that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed.[19]

The second element is not present here. The evidence does not demonstrate that Daniel's injury could have only been proximately caused by the intramuscular injection, because the experts' opinions differed about whether the injection actually caused his nerve injury. For example, Dr. Fitz opined that, based on Daniel's complaints, the intramuscular injection caused the injury, while Dr. Ferree opined that the injection did not cause Daniel's injuries. Res ipsa loquitur may be applied only where the injury would not have occurred in the absence of negligence.[20] Because the cause of Daniel's injury was in dispute, the court's decision not to give the res ipsa loquitur instruction was proper. Accordingly, we overrule the second assignment of error.

The Brokamps' contention, in their third assignment of error, that the trial court erred by not giving an instruction relating to "negative inference" is feckless. They aver that the court should have instructed the jury as follows:

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[19] *See Morgan v. Children's Hosp.* (1985), 18 Ohio St.3d 185, 480 N.E.2d 464, syllabus; *Oberlin v. Friedman, supra; Coleman v. Mullins* (July 16, 1997), Scioto App. No. 96 CA 2462, unreported.

[20] *See Coleman v. Mullins, supra.*

> "Where evidence which would properly be part of the case is within the control of the party whose interest it would naturally be to produce it, and without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him.
>
> If a party suppresses evidence which he has been called upon to produce, it may be presumed that his opponent's claims upon such evidence is true.

The concept of negative, or adverse, inference arises where a party who has control of the evidence in question fails, without satisfactory explanation, to provide the evidence.[21] In that situation, the jury may draw an inference that would be unfavorable to that party.[22] For example, this concept applies where the party willfully suppresses evidence that, if produced, would explain that party's conduct.[23] "Ohio courts normally would require a strong showing of

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[21] *See Reams v. State ex rel. Favors* (1936), 53 Ohio App. 19, 22, 4 N.E.2d 151, 152.

[22] *See id.*

[23] *See Vernardakis v. Thriftway, Inc.* (May 7, 1997), Hamilton App. No. C-96-0713, unreported; *Cherovsky v. St. Luke's Hosp. of Cleveland* (Dec. 14, 1995), Cuyahoga App. No. 68326, unreported; *Temple v. CCC Highway, Inc.* (Mar. 28, 1991) Cuyahoga App. Nos. 58402 and 58404, unreported.

malfeasance--or at least gross neglect--before approving such a charge."[24]

There is no evidence of malfeasance here. The mere fact that Nurse Barringer did not chart the injection site does not warrant a conclusion of gross neglect. In fact, the jury specifically found in its answer to a special interrogatory that the medical records were not "intentionally altered, falsified, or destroyed by any agent or employee of defendant Mercy Hospital for the purpose of preventing liability for medical negligence." Thus, we overrule the third assignment of error.

Finally, the Brokamps contend that the trial court erred "in refusing to charge the jury on punitive damages when the predicates have been established." According to the record, the court did not refuse to give an instruction relating to punitive damages, but instead stated,

> "I'm not refusing to give them, but I don't believe that it is appropriate until the jury determines that there is a basis for such damages and that basis being the intentional destruction of the hospital records."

The trial court's determination was not prejudicial to the Brokamps. As we have stated above, the jury responded in the negative to the special interrogatory. Where the jury's

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[24] *Vernardakis v. Thriftway, Inc., supra,* quoting *Sullivan v. General Motors Corp.* (N.D. Ohio 1991), 772 F.Supp. 358, 364, citing *Banks v. Canton Hardware Co.* (1952), 156 Ohio St. 453, 461, 103 N.E.2d 568, 573.

resolution of one issue obviates the need to determine a second issue, the court's instructions on the second issue become immaterial.[25] Thus, because the jury found no evidence of intentional destruction of the medical records, the question of punitive damages relating to this issue became moot.

Moreover, the Brokamps have also suggested, at trial and in their appellate brief, that an instruction on punitive damages was necessary because Nurse Barringer knew there was a risk of harm if he gave the shot improperly. In medical malpractice cases, punitive damages may be awarded upon the showing of "actual malice."[26] Actual malice can be placed in two general categories: first, behavior characterized by hatred, ill will, or a spirit of revenge, and, second, extremely reckless behavior revealing a conscious disregard for a great and obvious harm.[27] The record is devoid of evidence suggesting that Nurse Barringer acted with "actual malice." And it is well established that the trial court need not give an instruction where there is no evidence supporting that

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[25] *See Sech v. Roger* (1983), 6 Ohio St.3d 462, 466, 453 N.E.2d 705, 709.

[26] *See, e.g., Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 635 N.E.2d 331, paragraph one of the syllabus.

[27] *See Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus.

instruction.[28] Because we find no support in the record for such an instruction, we overrule the tenth assignment of error.

H. Directed Verdict and Judgment Notwithstanding the Verdict (jnov)

In their thirteenth assignment of error, the Brokamps allege that the trial court erred in denying their motion for directed verdict. In their fourteenth assignment of error, they contend that the trial court erred in not granting their motion for jnov.

In ruling upon either a motion for a directed verdict pursuant to Civ.R. 50(A) or a motion for judgment notwithstanding the verdict pursuant to Civ.R. 50(B), the court is not concerned with the weight of the evidence or the credibility of the witnesses.[29] The court may grant either motion only if, after construing the evidence most strongly in favor of the nonmoving party, it finds that upon any essential issue reasonable minds could come to only one conclusion and that conclusion is adverse to that party.[30] A directed verdict is permitted where the evidence presented at trial is so one-

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[28] *See Riley v. Cincinnati* (1976), 46 Ohio St.2d 287, 348 N.E.2d 135.

[29] *See Osler v. Lorain* (1986), 28 Ohio St.3d 345, 504 N.E.2d 19, syllabus.

[30] *See id.* at 347, 504 N.E.2d at 21-22.

sided that reasonable minds can come to but one conclusion.[31] The same test to be applied on a motion for directed verdict is also applied to a motion for jnov.[32]

The Brokamps argue that their directed-verdict motion should have been granted because appellees were negligent. Specifically, they allege that Mercy Hospital "admitted" that its standard of care was breached by failing to properly document the site of the injection, and by giving an improper injection. The Brokamps, however, misstate the appellees' arguments. Neither Mercy Hospital nor Nurse Barringer ever admitted a breach of the standard of care by giving an improper injection or not documenting where the injection was given. Moreover, no evidence was presented that Mercy Hospital had a policy or procedure obliging its nurses to document the site of an injection. Therefore, as a matter of law, reasonable minds could not conclude only that appellees, ipso facto, had admitted to negligence. Accordingly, we conclude that the trial court did not err in denying the Brokamps' motion for directed verdict, and their thirteenth assignment of error is overruled.

The Brokamps also contend that the trial court erred by not granting their jnov motion because the evidence presented suggested that the injection injury, which occurred in the ordinary course of events, would not have occurred in

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[31] *See Shepherd v. Westlake* (1991), 76 Ohio App.3d 3, 10, 60 N.E.2d 1095, 1099.

[32] *See Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334, 338.

the absence of negligence. Because we have already held that the trial court did not err by refusing to give a res ipsa loquitur jury instruction, the trial court was warranted in denying the jnov motion for similar reasons. Accordingly, the fourteenth assignment of error is overruled.

I. Motion for a New Trial

In the first and fifteenth assignments of error, the Brokamps argue that the trial court erred in overruling their motion for a new trial. They maintain that the trial court erred by not granting a new trial because of alleged juror misconduct and because the verdict was against the manifest weight of the evidence. We find these arguments unpersuasive.

In moving for a new trial, the Brokamps relied on Civ.R. 59(A)(2) and (6). The granting or denial of a motion for a new trial pursuant to Civ.R. 59(A) is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.[33] As we have already stated, the term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.[34]

The Brokamps' allegation of juror misconduct, in their first assignment, is the most serious. Specifically, they

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[33] *See Rhode v. Farmer* (1970), 23 Ohio St.2d 82, 262 N.E.2d 685, paragraph one of the syllabus.

[34] *See id.* at 87, 262 N.E.2d at 689.

maintain that one of the jurors failed to truthfully disclose his personal opinions during voir dire, and that this omission prejudicially affected their constitutional rights to a fair trial and an impartial jury. This allegation was presented to the court by proffer from the Brokamps after the verdict had been rendered. Two jurors were then called before the court and questioned about an alleged improper comment.

Evid.R. 606(B) governs the type of evidence that may be considered when a court inquires into the validity of a verdict. This evidentiary rule embodies the aliunde rule, which requires the introduction of evidence from a competent source other than a juror to impeach a jury verdict.[35] The jury's verdict may not be impeached by evidence from a member of the jury unless a foundation for the introduction of such evidence is first laid from some other source.[36] Here, the only foundation provided was a proffer by the Brokamps' counsel, who did not have firsthand knowledge of the jury deliberations. Such a proffer did not constitute evidence aliunde.[37] Because there was insufficient evidence aliunde, we conclude that the trial court did not abuse its discretion in denying the motion for new trial.

The Brokamps also argue, in their fifteenth assignment of error, that the trial court erred by refusing to grant a new

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[35] *See, e.g., State v. Schiebel* (1990), 55 Ohio St.3d 71, 75, 564 N.E.2d 54, 61, *State v. Doan* (Sept. 29, 1995), Hamilton App. No. C-940330, unreported.

[36] *See State v. Schiebel, supra.*

[37] *See, e.g., Schiebel, supra; State v. Doan, supra.*

trial under Civ.R. 59(A)(6) on the ground that the judgment was not sustained by the weight of the evidence. In assessing whether a trial court has abused its discretion under Civ.R. 59(A)(6), we must keep in mind that the trial court must do the following:

> "[W]eigh the evidence and pass upon the credibility of the witnesses, not in the substantially unlimited sense that such weight and credibility are passed on originally by the jury but in the more restricted sense of whether it appears to the trial court that manifest injustice has been done and that the verdict is against the manifest weight of the evidence.[38]"

Thus, we will not reverse on manifest-weight-of-the-evidence grounds if a judgment is supported by some competent, credible evidence.

After reviewing the record, we conclude that the evidence was sufficient to warrant a denial of the motions. Competent, credible evidence was adduced at trial to support a verdict in appellees' favor. The jury could reasonably have concluded that Nurse Barringer did not breach his duty of care and did not improperly administer the intramuscular injection. Furthermore, the jury could have reasonably concluded that Daniel Brokamp was not injured as a result of the injection given by Nurse Barringer. Credibility was an issue to be

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[38] *Rhode, supra*, at paragraph three of the syllabus.

resolved by the trier of fact.[39] Thus, because there was competent, credible evidence presented at trial to support a verdict in appellees' favor, we conclude that the jury's verdict was not against the manifest weight of the evidence. Accordingly, we overrule the first and fifteenth assignments of error.

Finally, the Brokamps argue in their eleventh assignment of error that the trial court demonstrated an undue prejudice against them. After reviewing the record, we cannot say that the trial court demonstrated undue prejudice. Accordingly, this assignment of error is overruled.

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[39] *See Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81, 461 N.E.2d 1273, 1277.

VI. Conclusion

In sum, we have overruled all twenty-one assignments of error. We conclude that the trial court properly entered judgment in favor of Mercy Hospital Anderson and James Barringer. Accordingly, we affirm the judgment of the trial court.

Judgment affirmed.

Gorman and Painter, JJ., concur.

The court has placed of record its own entry in this case on the date of the release of this Opinion

APPENDIX B

SUPREME COURT OF OHIO

No. 99-1028

[Filed: September 1, 1999]

BROKAMP	)
	)
v.	)
	)
MERCY HOSP. ANDERSON	)
	)

ORDER

DISMISSALS, SUE SPONTE, NO SUBSTANTIAL CONSTITUTIONAL QUESTION AND DISCRETIONARY APPEALS, IF APPLICABLE ARE NOT ALLOWED

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned 'Supreme Court of Ohio Motion Tables'.)

Hamilton App. No. C-971077.

DOUGLAS, J., would allow on Propositions of Law Nos. I, II, III and IV.

APPENDIX C

SUPREME COURT OF OHIO

No. 99-1028

[Filed: October 20, 1999]

BROKAMP	)
	)
v.	)
	)
MERCY HOSP. ANDERSON	)
	)

ORDER

RECONSIDERATION DOCKET

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned 'Supreme Court of Ohio Motion Tables'.)

Hamilton App. No. C-971077. Reported at 86 Ohio St.3d 1461, 715 N.E.2d 565. On motion for reconsideration. Motion denied.

F.E. SWEENEY, J., dissents.

APPENDIX D

COURT OF APPEALS OF OHIO
TWELFTH DISTRICT, WARREN COUNTY

[Filed: March 15, 1999]

No. CA-98-03-025

PETER MAZORRA, et al.,
Plaintiffs-Appellants,

v.

H. MEYER DAIRY COMPANY, et al.
Defendants-Appellees.

OPINION

POWELL.

Plaintiffs-appellants, Peter and Margaret Mazorra, appeal a jury verdict based on the alleged misconduct and bias of a juror, the trial court's response to a jury question during

deliberation and a manifest weight of the evidence argument. Defendants-appellees are H. Meyer Dairy Company, Terry R. Boerger and Allstate Insurance Company. We reverse.

This case concerns an automobile accident caused by the negligence of Boerger, an employee of H. Meyer Dairy Company, which caused injuries to Peter Mazorra. Allstate Insurance Company was included as a defendant pursuant to an uninsured/underinsured motorist policy of the Mazorras. The parties stipulated liability and proceeded to trial on the sole issue of damages. During voir dire, one of the eventual jurors, Chip Jones, remained silent about his relationship with appellants' son, David Mazorra-Black, who testified during the second day of the trial. Specifically, the trial court asked the potential jury panel if they knew any of the interested parties. In addition, trial counsel for appellants told the potential jurors that David Mazorra-Black and other witnesses would be testifying. Trial counsel for appellants stated that "I don't know whether any of your kids know or you've run into any of those folks in Lebanon." Based on the transcript, Chip Jones did not respond to either query.

After a four-day jury trial, appellants were awarded $3,979.29 in damages, including $2,379.29 for Peter Mazorra's medical bills and $1,600 for his "to date" pain and suffering. The jury did not award any damages for future pain and suffering, "[l]oss of enjoyment of life," lost wages or the derivative consortium claim of Margaret Mazorra.

In his affidavit, David-Mazorra Black stated that when he testified on the second day of trial, he noticed that Chip Jones, a personal acquaintance, was a member of the jury. According to his affidavit, Black "did not have an

opportunity" to discuss this issue with appellants until after the trial. According to the affidavit of Margaret Mazorra, Black told her that Chip Jones disliked the Mazorras because Jones perceived them as wealthy.

Appellants subsequently filed a motion for new trial pursuant to Civ.R. 59. Appellees filed a memorandum in opposition to the motion and a motion to strike affidavits. The trial court struck the affidavits of Daniel F. Jones, II and Sean Burchwell, nonjurors acquainted with Chip Jones, as "improper evidence aliunde," concluding the affidavits were inadmissible hearsay. In addition, the trial court struck the affidavits of jurors Edwin Johnson and Deborah Amburgy pursuant to Evid.R. 606(B). Appellants filed a motion for reconsideration which was overruled by the trial court. Appellants filed a timely notice of appeal and present four assignments of error for our review:

Assignment of Error No. 1:

THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFFS-APPELLANTS BY ORDERING STRICKEN THE AFFIDAVITS OF NON-JURORS PERTAINING TO FIRST HAND KNOWLEDGE OF A JUROR'S INCOMPETENCE.

Assignment of Error No. 2:

THE TRIAL COURT ERRED IN NOT GRANTING PLAINTIFFS-APPELLANTS MOTION FOR A NEW TRIAL UNDER OHIO CIVIL RULE OF PROCEDURE 59(A) BECAUSE OF JUROR IRREGULARITY AND MISCONDUCT WHICH PREVENTED PLAINTIFFS

FROM RECEIVING THEIR CONSTITUTIONALLY PROTECTED RIGHT TO A FAIR TRIAL.

Assignment of Error No. 3:

THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFFS-APPELLANTS BY ITS REFUSAL TO ANSWER A JURY QUESTION OR TO MODIFY ITS INSTRUCTION TO THE JURY.

Assignment of Error No. 4:

THE TRIAL COURT ERRED IN NOT ORDERING A NEW TRIAL WHEN THE EVIDENCE IS UNDISPUTED THAT PLAINTIFF-APPELLANT HAS PERMANENT IMPAIRMENT AND THE JURY'S AWARD FOR FUTURE PAIN AND SUFFERING IS ZERO.

In the first assignment of error, appellants assert that the trial court erred by striking the affidavits of Daniel F. Jones, II and Sean Burchwell. Daniel F. Jones, II is Chip Jones' nephew and a "personal acquaintance" of the Mazorras. He has been a guest in the home of Chip Jones on numerous occasions. Sean Burchwell is a "personal acquaintance" of the Mazorras and Chip Jones. Daniel F. Jones' affidavit stated "[t]hat Chip Jones had a personal dislike of David Mazorra." In addition, the affidavit contains a series of hearsay statements allegedly made by Chip Jones to the affiant. Chip Jones allegedly stated that he (1) "was prejudiced against the Mazorras as he felt they were rich and did not need any more money," (2) "took full advantage of [the] opportunity" to hurt the Mazorras," and (3) "the

Mazorras." The affidavit of Sean Burchwell is substantially similar.

Evid.R. 606(B), inquiry into validity of verdict or indictment, provides in relevant part that:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented."

Evid.R. 606(B) codifies Ohio's aliunde rule. *Michelson v. Kravitz* (1995), 103 Ohio App.3d 301, 305, 659 N.E.2d 359, citing *State v. Adams* (1943), 141 Ohio St. 423, 48 N.E.2d 861. "The aliunde rule requires the introduction of evidence from a competent source other than a juror to impeach a jury verdict." Evid.R. 606(B), Staff Note. The evidence aliunde "must come from a source possessing firsthand knowledge and cannot be acquired by the court through affidavits of the jurors themselves." *State v. Lewis* (1990), 70 Ohio App.3d 624, 641, 591 N.E.2d 854.

In our view, the admissible portion of the affidavits of Burchwell and Daniel F. Jones, II contain sufficient evidence

aliunde. The affidavits include a series of inadmissible hearsay statements by Chip Jones. *See Sedgwick v. Kawsaki Cycleworks, Inc.* (1991), 71 Ohio App.3d 117, 136, 593 N.E.2d 69. Specifically, paragraphs seven through eleven in the affidavit of Daniel F. Jones, II and paragraphs seven through ten in the affidavit of Sean Burchwell constitute hearsay. These statements are not admissible because a juror cannot "impeach his or her verdict directly by affidavit," and therefore appellants "cannot indirectly attempt to impeach the verdict by affidavit as to what one juror said to a third party." *Id.*

However, the affidavits of Daniel F. Jones, II and Burchwell do include admissible statements relevant to bias. First, the fact that Chip Jones was acquainted with David Mazorra-Black and "[t]hat Chip Jones had a personal dislike for David Mazorra." These portions of the affidavits warrant an evidentiary hearing to conclude if Chip Jones' relationship with David Mazorra-Black and the alleged bias of Chip Jones toward the Mazorra family infected the jury deliberation by Chip Jones providing "extraneous prejudicial information" about the Mazorras to the remaining jurors. Since portions of the affidavits of Burchwell and Daniel F. Jones, II are admissible and constitute evidence aliunde, the trial court erred by striking the juror affidavits of Edwin Johnson and Deborah Amburgy pursuant to Evid.R. 606(B). Accordingly, the first assignment of error is well-taken.

In the second assignment of error, appellants argue that juror misconduct denied them the constitutional right to a fair trial. Specifically, appellants reference Chip Jones' failure to respond to questions about his relationship with the Mazorras during voir dire. Appellants cite the decision in

State v. Rudge (1993), 89 Ohio App.3d 429, 624 N.E.2d 1069, for the proposition that untruthful answers by a juror in voir dire are not covered by Evid.R. 606(B). Therefore, appellants insist that the evidence showing Chip Jones was untruthful during voir dire is admissible and justifies the granting of a new trial. Although the issues are related, we agree with appellants that a juror being untruthful, even by omission, during voir dire is a separate issue from the jury deliberation. A juror prejudging his vote on damages of a trial raises an obvious question about fundamental fairness and due process. However, this court is not in the position to act as a trier of fact to resolve the question of whether Chip Jones was untruthful, either in his statements or by his omission of statements during voir dire, and based his decision on factors other than the evidence presented at trial. If Chip Jones was untruthful about his relationship with David Mazorra-Black and his bias, prejudiced the outcome, the motion for new trial must be granted. Nevertheless, the trial court must evaluate these issues at an evidentiary hearing. Accordingly, the second assignment of error is well-taken.

Based on the first and second assignments of error, this case is remanded for an evidentiary hearing to address (1) whether Chip Jones brought "extraneous prejudicial information" to the jury deliberation, corrupting the validity of the verdict and (2) whether Chip Jones failed to fully respond to questions during voir dire about his relationship with David Mazorra-Black and if his bias prejudiced his consideration of the evidence presented at trial. If either of the questions is answered in the affirmative, the motion for a new trial must be granted by the trial court.

Since we are remanding this case for an evidentiary hearing in order to fully resolve the issues raised by appeliants' first and second assignments of error, the third and fourth assignments of error are now prematurely before this court and are overruled as moot.

Judgment reversed and remanded for proceedings not inconsistent with this opinion.

KOEHLER and WALSH, JJ., concur.

Supreme Court, U.S.
FILED
MAR 30 2000
CLERK

(2)

No. 99-1332

IN THE

Supreme Court of the United States

DANIEL BROKAMP and DONNA BROKAMP,

Petitioners,

v.

MERCY HOSPITAL ANDERSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO FIRST DISTRICT, HAMILTON COUNTY

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by Petitioners are as follows:

1. Is not the United States Constitution violated when the courts permit a juror to serve (and be the deciding vote) where said juror does not believe that people should be allowed to come to court to ask for money?

2. When, during *voir dire*, a prospective juror fails to fully and/or truthfully disclose personal opinions which override the justice system, the inquiry for the court then is not into the validity of the verdict; but rather, the competency of the juror to sit as a juror in the case, and upholding the constitutional right to impartial jurors are at issue and the *aliunde* rule is inapplicable.

3. If a juror's bias or prejudice is demonstrated which was not honestly disclosed in *voir dire* the trial court has a duty to declare a mistrial and protect the Constitutional guarantee of an impartial jury.

4. Where a plaintiff adduces evidence in support of two conclusions: (1) that the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed the trial court errs in refusing a request to charge the jury on the issue of *res ipsa loquitur*.

5. Where a party has no explanation for the absence of evidence that is normally present, a court should, upon request, instruct the jury as to a negative inference.

6. Great care must be used if a judge questions a witness so as not to seem to become an advocate or give the jury an erroneous impression and a court should not inject its own opinion for that of expert witnesses.

7. A party subjected to clear prejudice by a trial court is denied "due process" under the United States Constitution and should be granted a new trial free of judicial prejudice.

CORPORATE DISCLOSURE STATEMENT OF MERCY HOSPITAL ANDERSON

Mercy Hospital Anderson is a nonprofit/tax-exempt 501(c)(3) corporation. Mercy Health Partners of Southwest Ohio, dba Mercy Health Partners (also a nonprofit/tax-exempt 501(c)(3) corporation) is the Parent/Member Corporation of Mercy Hospital Anderson. Mercy Hospital Anderson is the parent/member corporation of Mercy Hospital Foundation, a nonprofit/tax-exempt 501(c)(3) corporation.

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STATEMENT OF JURISDICTION

Supreme Court Rule 10 states that this Court will only grant a petition in its discretion and only for compelling reasons, and explains the character of the reasons that the Court will consider. These reasons include, but are not limited to, a state court of last resort deciding an important federal question in a way that conflicts with the decision of another state court of last resort or a United States Court of Appeals, a state court or United States Court of Appeals deciding an important question of federal law that has not been, but should be, settled by this Court, or deciding an important federal question in a way that conflicts with a relevant decision of this Court. Rule 10 further explains that a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Petitioners Brokamp have not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction.

Petitioners do not and cannot state an adequate basis for jurisdiction because the state court did not decide an important question of federal law and none was presented. *Adams v. Robertson*, 520 U.S. 83, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997). The state court decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 2553, 115 L. Ed. 2d 640 (1991). This Court lacks jurisdiction to review independently supported judgments on direct appeal, and since the state law determination is sufficient to sustain the decree, any opinion of this Court on a federal question would be advisory. *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S. Ct. 459, 462-464, 89 L. Ed. 789 (1945); *see also Sochor v. Florida*, 504 U.S. 527, 533-534, 112 S. Ct. 2114, 2119-2120, 119 L. Ed. 2d 326 (1992).

These issues will be more fully explained below.

STATEMENT OF THE CASE

Petitioners, Daniel and Donna Brokamp, have filed a petition for writ of certiorari against Respondent Mercy Hospital Anderson. [1]

The Petitioners argue that a new trial should have been granted given the "irregularity of the proceedings" and misconduct of the jury.

As to any irregularity in the proceedings, Petitioners assert that the trial judge improperly questioned Petitioners' counsel during trial. What the petition does not state is that said questioning was conducted outside of the presence of the jury and involved only the trial judge and Respondent's counsel.

The specific allegation of juror misconduct is that one of the jurors, Earl Eldridge, identified as Juror No. 4, was not impartial. Two of the jurors informed Petitioners' counsel that one of their members stated that he did not believe that people should be allowed to "come into court and get money." Petitioners claim that Juror No. 4 was untruthful in his responses to questions during *voir dire* and that the failure

1. The petition erroneously identifies James Barringer as a Respondent. Petitioners' complaint filed in the Hamilton County Court of Common Pleas, Hamilton County, Ohio, named as Defendants Mercy Hospital Anderson and John Doe, R.N. Petitioners' state court appeal to the Hamilton County Court of Appeals for the First Appellate District of Ohio (hereinafter "Hamilton County Court of Appeals") also identified only Mercy Hospital Anderson and John Doe, R.N. as defendants-appellees, as did Petitioners' memorandum in support of jurisdiction filed with the Supreme Court of Ohio. Throughout the state court proceedings, Petitioners Brokamp never substituted an identifiable individual for the John Doe, R.N. party. Therefore, Respondent James Barringer is not properly before this Honorable Court as he was not a party to the proceedings in the state court.

to answer truthfully concealed his bias.[2] What the petition does not state is that this exchange occurred while Petitioners' counsel interviewed the jury *after the trial.*

At the trial court level, Petitioners filed a motion for a new trial and for judgment notwithstanding the verdict. This motion contained a brief argument that the alleged jury misconduct deprived Petitioners of a fair trial because they did not have an impartial jury. The constitutional issue of an impartial jury was ancillary, however, to the actual legal issue that the trial court was asked to address. Indeed, any constitutional arguments were ancillary to the legal issue the state courts were asked to address at every level, including most importantly the Hamilton County First District Court of Appeals. At the state court level, the legal dispute was over the applicability of the *aliunde* rule.

The Hamilton County Court of Appeals dealt with Petitioners' arguments about the alleged juror misconduct in a succinct fashion and based entirely upon Evidence Rule 606(B):

> The Brokamps' allegation of juror misconduct, in their first assignment, is the most serious. Specifically, they maintain that one of the jurors failed to truthfully disclose his personal

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2. The actual question asked by the trial court was "[i]s there anybody here that will not follow the law as I give it to you, whether you agree with it or not?" Petitioners recite this question at Page 11 of the petition in Footnote 2. There is no evidence whatsoever that Juror No. 4 answered that question falsely or that he failed to follow the law as required by the trial court. There is no evidence whatsoever that Juror No. 4 allowed his alleged prejudice to dictate his vote. Indeed, five other jurors voted the same way as Juror No. 4. Moreover, the jurors that were interviewed by Petitioners' counsel did not testify that Juror No. 4 attempted to persuade any other member of the jury to agree with him or follow his lead.

> opinions during voir dire, and that this omission prejudicially affected their constitutional rights to a fair trial and an impartial jury. This allegation was presented to the court by proffer from the Brokamps after the verdict had been rendered. Two jurors were then called before the court and questioned about an alleged improper comment.
>
> Evid. R. 606(B) governs the type of evidence that may be considered when a court inquires into the validity of a verdict. This evidentiary rule embodies the aliunde rule, which requires the introduction of evidence from a competent source other than a juror to impeach a jury verdict. [citations omitted]. The jury's verdict may not be impeached by evidence from a member of the jury unless a foundation for the introduction of such evidence is first laid from some other source. [citations omitted]. Here, the only foundation provided was a proffer by the Brokamps' counsel, who did not have firsthand knowledge of the jury deliberations. Such a proffer did not constitute evidence aliunde. [citations omitted]. Because there was insufficient evidence aliunde, we conclude that the trial court did not abuse its discretion in denying the motion for new trial.

Hamilton County Appellate Opinion, Appendix A to petition, Pages 30a-31a. The Hamilton County Court of Appeals concluded that the trial court did not abuse its discretion in denying Petitioners' motion for a new trial. The Supreme Court of Ohio declined jurisdiction.

REASON FOR DENYING THE WRIT

It is virtually impossible to determine from the petition exactly what ruling Petitioners are requesting this Court to review. Assuming, *arguendo*, that the petition seeks review of the rulings by the Supreme Court of Ohio, the law does not permit this Court to review such rulings. While 28 U.S.C.A. does permit review of a decision of the highest state court, a state supreme court's decision to exercise its discretion to decline an appeal is not a judgment or decree reviewable by the United States Supreme Court. *Hill v. Town of Conway*, 193 F.3d 33 (1st Cir. 1999). Appendix B of the petition reflects the ruling of the Supreme Court of Ohio to dismiss the appeal *sua sponte* because no substantial constitutional question exists, and to decline the discretionary appeal. Appendix C reflects the Supreme Court of Ohio's denial of Petitioners' motion for reconsideration of the order reflected in Appendix B.

If the petition seeks to have the Court review the decision of the Hamilton County Court of Appeals, it fails for the following reasons. First, the Hamilton County Court of Appeals decision rested on adequate state law grounds and did not decide an important federal question. Indeed, it did not decide a federal question at all. No state court in the history of this matter decided an important federal question. The Hamilton County Court of Appeals simply decided a state law evidentiary issue in affirming trial court rulings.

In Ohio, a trial court may not consider a post-verdict allegation of juror bias premised upon information disclosed by jurors who participated in the deliberation process absent competent evidence *aliunde*. *Lund v. Kline*, 133 Ohio St. 317, 13 N.E.2d 575 (1938) (slips of paper retrieved from jury room not evidence *aliunde* of juror misconduct). *State v. Adams*, 141 Ohio St. 423, 48 N.E.2d 861 (1943) (*aliunde* rule not applicable where misconduct is by officer of court).

The *aliunde* rule protects a jury verdict and the constitutional elements of a fair trial. The Ohio Supreme Court stated in *State v. Adams*, *supra*, that:

> [T]he [aliunde] rule is based upon considerations of public policy, which, if not adhered to, would encourage further litigation and indefinitely postpone its termination; that to permit a juror to impeach the verdict by his testimony would allow a dissatisfied or corrupt juror to destroy a verdict after he had assented to it; and that to permit such testimony would destroy the privacy of deliberations of the jury and expose the jurors to criticisms and embarrassment.

Id., at 427, 48 N.E.2d 863.

This Court recognized the need for jury verdicts to remain inviolate in the decision in *McDonald v. Pless*, 238 U.S. 264 (1915), when Justice Lamar wisely wrote:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all

> frankness and freedom of discussion and conference.

Id., at 238 U.S. 264, 267-68.

The issue presented to the state courts was the applicability of the *aliunde* rule. The *aliunde* rule is codified in Ohio in Evidence Rule 606(B), and allows inquiry into the validity of a verdict "only after some outside evidence of that act or event has been presented." Ohio Evidence Rule 606(B) provides as follows:

> **Evidence Rule 606. COMPETENCY OF JUROR AS WITNESS**
>
> * * *
>
> (B) Inquiry into validity of verdict or indictment
>
> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. A juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of

> any officer of the court. His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes.

Ohio Rule of Evidence 606(B). Evidence in the form of testimony by a member of the jury alleging misconduct of another juror is not evidence *aliunde* that may be used to impeach a verdict. *See State v. Schiebel*, 55 Ohio St. 3d 71, 564 N.E.2d 54 (1990), *cert. denied*, 499 U.S. 961, 111 S. Ct. 1584 (1991) .

Based upon the application of Evid. R. 606(B) and the *aliunde* rules, the Hamilton County Appellate Court concluded that the trial court did not abuse its discretion in denying Petitioners' motion for a new trial. The Hamilton County Appellate Court did not decide an important federal question. Petitioner never presented an important federal question. The state court rulings were based entirely upon state evidentiary rules, and the state law provided adequate grounds. If both the requirements that a federal question has been raised and decided in the state court below do not appear on the record, the appellate jurisdiction of the Supreme Court fails. *Illinois v. Gates*, 103 S. Ct. 2317, 462 U.S. 213, 76 L. Ed. 2d 527, *rehearing denied*, 104 S. Ct. 33, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983). If the federal issue was not presented to the state courts in such a manner that it was necessarily decided by the highest state court, the United States Supreme Court would have no power to consider the issue. *Street v. New York*, 89 S. Ct. 1354, 394 U.S. 576, 22 L. Ed. 2d 572, *on remand* 250 N.E.2d 250, 302 N.Y.S.2d 848, 24 N.Y.2d 1026 (1969). Moreover, Petitioners have never made the argument that the *aliunde* rule violates due process or is unconstitutional.

Furthermore, the petition contains an argument that the trial court was prejudiced against the claims of the Petitioners

and that such prejudice pervaded the entire trial. See Petition, pp. 20-21. At no point, however, does the petition describe how this alleged prejudicial attitude of the trial court affected any specific rulings during the trial. More importantly, the petition never describes how the Hamilton Appellate Court's opinion decided an important federal question related to the trial court's alleged prejudice. The simple reason for this failure is that the Hamilton Appellate Court decision did not decide an important federal question in this regard.

At the state appellate level, Petitioners complained that the trial court prejudiced the entire case because of a factual misconception regarding the location and identification of the nerve that Petitioners' claim was injured by a negligent injection. The only portion of the appellate ruling that addressed the claims of judicial prejudice came at the very end of the opinion when the court stated "After reviewing the record, we cannot say that the trial court demonstrated undue prejudice." Moreover, as pages 21 and 22 of the petition clearly explain, the Petitioners are complaining about the trial court's factual finding regarding the mid-case switch of the nerve at issue. As dictated by Supreme Court Rule 10, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Therefore, the trial court's factual decisions do not constitute a basis for this Court exercising jurisdiction.

Petitioners only discuss the trial court's rulings in their petition. The petition wholly fails to discuss the decision of the Hamilton County Appellate Court. This Court only has jurisdiction to review the decision of the highest state court in which a decision could be had. 28 U.S.C.A. § 1257. Therefore, since Petitioners fail to address or even mention the state appellate court's ruling, this Court should deny the petition.

At the state court level, Petitioners vaguely argued that the Sixth Amendment conferred the right to an impartial jury.[3] In their Hamilton County appellate brief, Petitioners' cited Ohio decisions from criminal cases for the proposition that the Sixth Amendment right to an impartial jury is violated if even one juror is unduly biased or prejudiced. *See State v. Rudge*, 89 Ohio App.3d 429, 624 N.E.2d 1069 (1993). The petition before this Court, however, recites the Fifth, Seventh and Ninth Amendments to the United States Constitution, but not the Sixth Amendment. The Fifth, Seventh and Ninth Amendments were never presented to the state courts and the state courts never decided an important federal issue regarding those Amendments.

CONCLUSION

Only federal questions will be reviewed by this Court on appeal from a state court. Supreme Court Rules 10 and 14. *See also U.S. ex rel. Pascal v. Burke*, 90 F. Supp. 868 (1950) (on review of the judgment of the highest court of a state, the United States Supreme Court will consider only the federal question raised, provided it has been properly brought before the state court). Therefore, this Court should deny the petition for writ of certiorari because it raises exclusively state law issues.

This Court's review function is extremely important and necessary to the working of our federal system. The Supreme Court Rules carefully and clearly delineate the types of cases and reasons for which this Court will exercise its review power. The case presented by this petition does not involve

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3. The Sixth Amendment to the Constitution of the United States is of course more appropriately applied to criminal prosecutions, as it states that "[i]n all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

a substantial or important question of federal law and this Court should decline to issue a writ.

For all of the reasons set forth above, Respondent requests that this most Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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